



Eye On Washington

Legislative Update



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Legislative Trends: Salary History Bans

Eye on Washington's new series focuses on the latest HR regulatory trends taking place at the federal, state, and local level. Topics include tax and HR compliance, Health Care Reform, payroll, benefits, leaves, reporting obligations, and more.

Intent of Legislation

Across the country in local, county, and state jurisdictions, laws restricting salary history inquiries seek to address pay discrimination and systemic pay inequities, due in part to studies that have shown that women earn less than men for comparable work. As the theory goes, using salary history in making compensation decisions only perpetuates existing pay gaps that may be the result of past discrimination. Lawmakers believe that if employers are prohibited from inquiring into a prospective employee's wage history, then they are more likely to base compensation decisions on merit alone and, thus, help close pay equity gaps.

Impacted Parties

As of March 2018, six states, several cities and counties, and Puerto Rico have all passed laws restricting how and whether employers can use a candidate's salary history in making compensation decisions. States where private employers are restricted in their use of salary history include California, Delaware, Massachusetts, and Oregon. Other states, such as New Jersey and New York, prevent state entities or state agencies from utilizing this information. San Francisco and New York City have also implemented laws which impact a private employer's ability to ask candidates questions about their wage history. In addition, many other jurisdictions are considering similar legislation and have bills pending in their legislatures.

Impact to Employers

Employers should be mindful of how these laws could affect their hiring practices. It is important for an employer to consider whether, where, and when salary-related questions can be asked during the hiring process. These questions could appear on an employer's application form, its background check authorization form, during a phone screen, on interview templates, in compensation guidelines, or even in dispositions. Further, even in

jurisdictions that may prohibit inquiries into salary history, exceptions may allow an employer to utilize the information under certain circumstances. For example, some laws permit the employer to inquire into, and/or confirm, salary history following a candidate's voluntary disclosure of the information. Others hold that an employer may inquire into, and/or confirm, salary history once a conditional offer of employment with compensation has been given to the candidate. Yet others allow the inquiry only after the candidate has accepted that employment offer. Employers also need to take into account when these exceptions are silent with respect to the use of the salary history information during compensation negotiations.

Another consideration for employers is the use of this information when determining a candidate's salary. Some employers utilize salary history to set realistic expectations about a position. Others may rely on the information to weed out those candidates whose previous wages may be outside the employer's range. Further, there may be difficulties putting together an attractive compensation package for a candidate if the employer is unaware of what the candidate has previously earned. With the passage of these new laws, employers may have to reevaluate these practices, focusing more, for example, on the market value of the position in setting the compensation to be offered.

Since more state restrictions will certainly follow, and each will have their own nuances, employers with a blanket salary history inquiry practice (i.e., standard policy that applies in all jurisdictions) will likely face increasing risks in noncompliance regarding these laws.

While seeking salary history is currently lawful in the overwhelming majority of jurisdictions, the landscape is changing fast. As a result of these new laws, employers should consult with their legal counsel and review their current practices to determine the appropriate use of salary history in their hiring and salary negotiation processes.

Enacted Legislation

The chart below lists jurisdictions with laws already enacted. Click on the name of the jurisdiction to see the text of the legislation.

Jurisdiction	Effective Date	Ask Candidate Pre-Offer Allowed?	Ask Previous Employer(s) Pre-Offer Allowed?	Ask Candidate Post-Offer Allowed?	Ask Previous Employer(s) Post-Offer Allowed?	Using Salary Information During Compensation Negotiations
California	01/01/18	No	No	No	No	<ul style="list-style-type: none"> Only when voluntarily disclosed by candidate
San Francisco, CA	Issuing warnings only until 6/30/19	No	No	No	No	<ul style="list-style-type: none"> Only when voluntarily disclosed by candidate Can discuss candidate's salary expectations
Delaware	12/14/17	No	No	After Acceptance	After Acceptance	<ul style="list-style-type: none"> Can discuss candidate's salary expectations
New Orleans, LA (City agencies only)	01/25/17	No	No	unknown	unknown	<ul style="list-style-type: none"> Legislation is silent with regard to use of voluntary information provided by candidate
Massachusetts	07/01/18	No	No	Yes	Yes	<ul style="list-style-type: none"> Legislation is silent with regard to use of voluntary information provided by candidate
New Jersey ("State entities" under Governor only)	02/01/18	No; except to verify if voluntarily disclosed by candidate	No	Yes	unknown	<ul style="list-style-type: none"> Legislation is silent with regard to use of voluntary information provided by candidate
New York ("State entities" only)	01/09/17	No	No	Yes	Yes	<ul style="list-style-type: none"> Legislation is silent with regard to use of voluntary information provided by candidate
Albany Cnty., NY	12/17/17	No	No	unknown	Yes	<ul style="list-style-type: none"> Legislation is silent with regard to use of voluntary information provided by candidate
New York City	10/31/17	No	No; except to verify if voluntarily disclosed by candidate	No	No; except to verify if voluntarily disclosed by candidate	<ul style="list-style-type: none"> Only when voluntarily disclosed by candidate Can discuss candidate's salary expectations
New York City (City agencies only)	12/04/16	No	No	Only to verify	Only to verify	<ul style="list-style-type: none"> "Pay history" may not be relied upon in determining salary offer
Oregon	01/01/19	unknown	No	unknown	unknown	<ul style="list-style-type: none"> "Current or past compensation" may not be used to determine compensation for a position Cannot "screen" candidates based on salary history
Pittsburgh, PA (City agencies only)	01/30/17	No	No	unknown	unknown	<ul style="list-style-type: none"> Only when voluntarily disclosed by candidate
Puerto Rico	Enforcing penalties 03/08/18	No	No	Yes	Yes	<ul style="list-style-type: none"> Only when voluntarily disclosed by candidate

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